

- (1) Whether the respondent should be granted an extension of its terminal date to provide additional evidence for consideration by the Appeals Board or the Special Administrative Law Judge.
- (2) Whether the Appeals Board should take judicial notice of the Form 88 filed by the respondent with the Workers Compensation Director in this matter.
- (3) What, if any, is the nature and extent of claimant's injury and/or disability?
- (4) What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

This matter went to regular hearing on April 6, 1995. Claimant's terminal date was established as May 6, 1995 with the terminal date of the respondent and the Workers Compensation Fund being June 6, 1995.

The claimant obtained the deposition of two doctors and submitted its case by submission letter on May 26, 1995. Claimant filed a supplemental submission brief on June 16, 1995. Respondent, prior to its terminal date, elected to schedule no depositions and submit no evidence to the Administrative Law Judge. Respondent's attorney acknowledges this fact contending that the development of a potential conflict of interest, involving the Administrative Law Judge and his utilization of respondent's law firm in certain private matters, caused respondent's attorney to place this case in limbo awaiting the appointment of a special administrative law judge. Respondent's reason for scheduling no depositions and submitting no evidence is unclear, as there appeared to be nothing inherent in this conflict which would prohibit respondent from taking depositions and submitting evidence prior to the appointment of a special administrative law judge.

On July 10, 1995, claimant's attorney advised the Workers Compensation Director that more than thirty (30) days had passed since the running of the terminal dates of the parties and the Administrative Law Judge's failure to decide this matter constituted a sufficient emergency under K.S.A. 44-523(c) for the appointment of a special administrative law judge to decide this matter. The Workers Compensation Director, on July 13, 1995, appointed Special Administrative Law Judge William F. Morrissey to issue an Award in this claim. The Award was submitted by Special Administrative Law Judge Morrissey on July 26, 1995. It is acknowledged by the parties that claimant's submission letter, claimant's letter to the Workers Compensation Director in July and the Order from the Workers Compensation Director appointing Special Administrative Law Judge Morrissey were all carbon copied to respondent at an incorrect address. Respondent contends this inaccuracy in the Certificates of Service has prejudiced respondent and constitutes justification under K.S.A. 44-523 to re-open the record and grant respondent the opportunity to submit additional evidence.

K.S.A. 44-523 does allow for an extension of a party's terminal date if any of the following conditions are met:

- “(1) If all parties agree;
- “(2) if the employee is being paid temporary or permanent total disability compensation;

- “(3) for medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or
- “(4) on application for good cause shown.”

Claimant and the Kansas Workers Compensation Fund disagree with and object to this extension of respondent's terminal date, thus eliminating condition number one. As claimant is not in need of a medical examination and is not being paid temporary or permanent total disability compensation, both criteria number two and number three fail to provide support for respondent's request.

Only “for good cause shown” can the respondent hope to accomplish its desired result. Unfortunately, even though there has been shown some difficulty with notices being presented to respondent's attorney due to inaccurate certificates of service, it is noted by the Appeals Board that these errors in notice all occurred substantially after respondent's terminal date had already run. Respondent acknowledges no contact was made either with the claimant's or the Workers Compensation Fund's attorneys prior to the expiration of its terminal date.

When asked the reason for the failure to submit evidence in a timely fashion, respondent was unable to provide appropriate justification. As such, the Appeals Board finds good cause has not been shown to justify an extension of respondent's terminal date in this matter and respondent's request is denied.

Next, respondent asks the Appeals Board to take judicial notice of a Form 88 filed by the respondent with the Division of Workers Compensation. Again, it is noted nothing was presented to the Special Administrative Law Judge prior to respondent's terminal date running. It is significant that this request for judicial notice was not originally made to the Administrative Law Judge during the litigation of this case.

K.S.A. 44-555b(a), as amended by S.B. 59 (1995), grants review by the Workers Compensation Appeals Board “upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.” Issues not originally raised before the administrative law judge cannot generally be raised before the Appeals Board. To allow this would be to prejudice opponents to newly raised issues as they would be unable to provide support for their position for any issues not raised before the administrative law judge. As such, the Appeals Board must find that judicial notice of respondent's Form 88 filed with the Director of Workers Compensation in this matter be denied.

The Appeals Board will next decide what, if any, is the nature and extent of claimant's injury and/or disability. Respondent contends the medical evidence is not sufficient to support an award to the claimant of a work disability. K.S.A. 44-510e(a) states in part:

“[P]ermanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the

physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Respondent contends the medical opinion of Dr. George G. Flutter, claimant's treating physician, is persuasive and claimant should be denied permanency as a result of the alleged injuries claimed. Dr. Flutter acknowledged that he had questions regarding claimant's complaints and the legitimacy of same. He also acknowledged that claimant had a preexisting spondylolisthesis which, in his opinion, may have been aggravated as a result of riding a mower with insufficient shock-absorbing capacity. The Appeals Board acknowledged Dr. Flutter's testimony is not strong when dealing with this alleged injury. In fact, Dr. Flutter could not say within reasonable medical certainty that riding the tractor contributed in any degree to claimant's permanency. Claimant did cause the deposition of Dr. Lawrence R. Blaty, a physiatrist, to be taken in this matter. Dr. Blaty felt that claimant's spondylolisthesis resulted from a history of traumatic events and he felt that claimant's preexisting condition was aggravated by the incidents occurring during the week leading up to October 13, 1993, while claimant was riding the tractor with insufficient shock-absorber capabilities.

K.S.A. 44-501(g) makes it claimant's burden of proof to show by a preponderance of the credible evidence claimant's entitlement to an award of compensation by proving the various conditions upon which the claimant's right depends. This burden of proof requires claimant to persuade the trier of facts by a preponderance of the credible evidence that the party's position on an issue is more probably true than not true based upon the whole record. K.S.A. 44-508(g). See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence not presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Dr. Blaty, in reviewing the evidence presented from Mr. Jerry Hardin, found that claimant suffered a loss of task performing abilities of eighty-two percent (82%) as a result of this injury. The claimant, being unable to obtain employment and currently being unemployed, also has a loss of the wage differential of one hundred percent (100%). K.S.A. 44-510e mandates claimant's loss of ability to perform work tasks be averaged with claimant's loss of wages. As such the Appeals Board finds claimant has suffered a ninety-one percent (91%) permanent partial general body work disability as a result of injuries suffered with respondent through October 13, 1993.

A claimant is precluded from recovering compensation when dealing with an aggravation of a preexisting condition except to the extent that the work-related injury caused increased disability. "Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." K.S.A. 44-501(c).

Dr. Blaty, in assessing functional impairment to claimant, found an eight percent (8%) permanent functional impairment relating to claimant's preexisting spondylolisthesis. K.S.A. 44-501(c) allows respondent the benefit of a reduction in functional impairment when found to be preexisting. The Appeals Board finds claimant suffered an eight percent

(8%) permanent partial functional impairment prior to the injuries suffered while employed with respondent and respondent would be entitled to a reduction of same from the work disability granted above. As such claimant is awarded a permanent partial general body disability of eighty-three percent (83%) in this matter.

The Appeals Board must next decide the issue of the liability of the Kansas Workers Compensation Fund.

K.S.A. 44-567(a) states in part:

"An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows"

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. *Box v. Cessna Aircraft Co.*, *supra*, at 246. In this instance respondent contends that it has proven knowledge of claimant's preexisting condition. The evidence does not support respondent's contentions. Claimant denies preexisting problems. Respondent argues that a pre-employment physical obtained in 1992 showing claimant to have suffered with spondylolisthesis, grade 2, is sufficient to show knowledge of a handicap on the part of the respondent. Unfortunately, the documents in question are not identified as having been in the possession of respondent at any time prior to claimant's injury in October 1993. In order for respondent to assess liability to the Fund it must prove that it had knowledge of a preexisting handicap. The Appeals Board finds no evidence in the record sufficient to support respondent's contention that it knowingly retained a handicapped employee. This lack of knowledge is fatal to respondent's contention that liability in this matter should be borne by the Fund. The Appeals Board finds respondent has failed to prove by a preponderance of the credible evidence that it knowingly hired or retained a handicapped employee as required by K.S.A. 44-567 and liability against the Kansas Workers Compensation Fund is herein denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated July 26, 1995, should be, and is hereby, modified and an Award is made in favor of claimant, Kenneth A. Woodworth in and against the respondent, City of Wichita, a qualified self-insured, for an accidental injury occurring on October 13, 1993, and based upon an average weekly wage of \$230.79, for 344.45 weeks permanent partial general body disability at the rate of \$153.87 per week in the sum of \$53,000.52 for an 83% permanent partial general body work disability.

As of December 18, 1995, claimant would be entitled to 113.71 weeks permanent partial general body work disability at the rate of \$153.87 per week in the sum of \$17,496.56 in one lump sum minus any amounts previously paid. Thereafter the remaining 230.74 weeks shall be paid at the rate of \$153.87 per week totalling \$35,503.96 until fully paid or until further order of the Director.

Future medical benefits are awarded only upon proper application to and approval by the Director.

Unauthorized medical of up to \$500 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

Liability against the Kansas Workers Compensation Fund and in favor of the respondent is denied.

The attorney fee contract is hereby approved insofar as it is not in contravention of K.S.A. 44-536.

The fees necessary to defray the expense of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates Transcript of Preliminary Hearing	\$207.40
Transcript of Regular Hearing	\$245.95
Ireland Court Reporting Deposition of Lawrence R. Blaty, M.D.	\$277.40
Deposition of Jerry D. Hardin	\$218.80
Deposition of George G. Fluter, M.D.	\$312.60

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, Kansas
James Roth, Wichita, Kansas
David J. Morgan, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director